EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Mr C Golding		i4C Executive Search Limited (In Voluntary Liquidation)

AT A FINAL HEARING

Held at: Lincoln **On**: 25, 27 & 28 November 2019
And in chambers on 24 January 2020

Before: Employment Judge R Clark

REPRESENTATION
For the Claimant: In Person.
For the Respondent: Mr Famutimi, consultant.

RESERVED JUDGMENT

The judgment of the Tribunal is as follows: -

1. The claim of breach of contract **fails and is dismissed**.

2. The claim of unfair dismissal **fails and is dismissed**.

REASONS

1. Introduction

1.1 This is a claim of unfair dismissal and breach of contract arising from the summary dismissal of the Claimant effective on 25 October 2017.

1.2 The central issue underlying both claims is whether the Claimant engaged in discussions with staff with a view to enticing those staff to work for him in a new business venture.

2. The Issues

2.1 Whilst both claims cover the same ground, my analysis of the events is fundamentally different under each claim.

2.2 The issues arising in the unfair dismissal claim are: -

a) Whether the Respondent can prove the reason, or if more than one the principal reason, for dismissal and that it was a potentially fair reason under s.98(1) of the Employment Rights Act 1996 ("the Act").

b) If it can, it is then for me to determine on the evidence before me, the burden being neutral, whether it was reasonable in the circumstances for the Respondent to rely on that reason as sufficient to dismiss the Claimant in accordance with s.98(4) of the Act.

2.3 The single issue in the breach of contract claim is: -

a) Whether the Respondent can prove that the Claimant was in fact guilty of conduct sufficient to justify termination without notice.

3. Evidence

3.1 For the Claimant I heard from Mr Golding; Miss Emily Page a previous colleague and partner of the Claimant and Caroline Adams, a former shareholder and director of the Respondent, contemporary with the latter part of the Claimant's employment.

3.2 For the Respondent I heard from Mr Hancock, the majority shareholder of the Respondent. I also heard from Mr Matthew Robinson and Darren Hastings who were both consultants at the time and subordinate to the Claimant. They each gave evidence of the discussions they had with the Claimant during which he is said to have asked them about how they would feel about working for him as the new owner of the Respondent and, significantly to this case, whether they would join him in a new venture if he chose an alternative plan to set up on his own.

3.3 All witnesses adopted written statements on oath or affirmation and were questioned. I received a bundle running to 212 pages and considered those documents I was taken to. Both parties made oral closing submissions.

4. Facts

4.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. My function is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

4.2 The Claimant was a recruitment consultant. The Respondent was a small recruitment consultancy. The majority shareholder was Mr Hancock who was at all times the controlling mind of the Respondent's business, particularly insofar as the events that lead to the dismissal of the Claimant. It has basic employment policies and procedures and access to remote HR advice.

4.3 The Claimant had worked in the business since 2011. A statement of main terms purporting to comply with s.1 of the Act had been issued as was a written contract of employment. The former describes the required notice after the probation period as "one month either way". In the latter, clause 12 set out rather fuller notice provisions after the conclusion of the probation period: -

> ***12.1 …. the Employment may be terminated by the Company or the Employee giving the following periods of notice in writing:***
>
> ***12.1.1 by the Company :***
>
> ***At least 1 months notice***
>
> ***12.2…***
>
> ***12.3…***
>
> ***12.4 The Company may terminate the Employment without notice, compensation or payment in lieu of notice and without payment in lieu of untaken holiday entitlement in excess of statutory leave entitlement in the event of gross misconduct by the Employee.***

4.4 The contract of employment also contained an extensive express confidentiality clause at clause 15. At clause 16, there is an equally extensive restrictive covenant. Clause 16.2.4 explicitly prohibits the soliciting of key employees of the Respondent. The clause opens with a temporal condition, namely: -

> ***16.2.4 For six months following the Termination Date….***

The term "Termination Date" is contained in a list of definitions of terms used in clause 16 and is defined as: -

> ***" the date on which the Employee's employment terminates…or such earlier date on which garden leave commences"***

It is therefore common ground that this term was not engaged during the currency of the employment or at the time the Claimant is alleged to have solicited, or enticed, his colleagues.

4.5 Supplementing the contractual relations was a staff handbook setting out a disciplinary procedure which at paragraph E provided a non-exhaustive list of “offences” that would normally be deemed as gross misconduct together with the general definition of any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship. The procedure is set out in basic form but conforms with the essential elements of the ACAS code.

4.6 The Claimant and Mr Hancock got on very well. The Claimant was good at his job. It was well known that he had aspirations to develop his career and an ambition to own his own business in the future. It is significant that this fact was well known to Mr Hancock. Mr Hancock invited the Claimant to become a director of the business and he keenly accepted, being appointed in December 2016. His contractual employment status was not altered after he commenced in that office but he acquired, in addition to his obligations under the terms of that contract of employment, all the fiduciary duties of a statutory director of a limited company and the responsibilities and duties imposed on him under the Companies Act 2006 to the company and its members.

4.7 As a means of reward and recognition, if not also retention, Mr Hancock then gifted the Claimant a 10% shareholding in the Respondent. This was recorded in a deed of share agreement signed on 10 March 2017. This was done not only for the Claimant, but also in respect of Caroline Adams. There was something of a restructure taking place as between the Respondent, a previous subsidiary company of the Respondent and the integration of Caroline Adams’ business, RealBee Recruitment Limited, into the i4C fold. She also became a director and received a 10% shareholding in the Respondent.

4.8 Despite the directorship and shareholding of Mr Golding and Mrs Adams, Mr Hancock kept the financial affairs and other matters very much to himself. This would become the source of significant frustration to them both. The business relationship between Mr Hancock and Mrs Adams has subsequently ended acrimoniously. Her evidence to the tribunal faced a difficulty of reconciling what she felt now with what had been said in the contemporaneous documentation.

4.9 A share agreement was signed as a deed and its terms deal with the parties’ future relationship including prescribing the arrangements for managing the end of the relationship. That included the definition of good and bad leavers and what happens to a leaver’s shareholding. In due course, Mr Golding would be classed as a bad leaver. The significant obligation in this agreement appears at clause 7.3. It provides: -

> ***7.3 Except with Shareholder Consent, no Shareholder shall, during the times specified below, offer employment to, enter into a contract for the services of, or attempt to solicit or seek to entice away from the Company any individual who is at the time of the offer, or attempt, a director, officer or employee with the Company or procure or facilitate the making of any such offer or attempt by any other person. The times during which the restrictions apply are:***
>
> ***(a) any time when the party in question is a Shareholder. and***

(b) for a period of 12 months after the party in question ceases to be a shareholder

4.10 In 2017 discussions took place between Mr Hancock and Mr Golding about the possibility of Mr Golding buying Mr Hancock out completely and taking control of the Respondent. Mr Hancock adopted a perfectly proper formal process for the potential sale of a private limited company to a third party which sought to protect the Respondent's interests by way of a disclosure and confidentiality agreement. That was signed by the parties on 2 May 2017. Its purpose was to allow the release of financial and other confidential information about the Respondent business to the potential purchaser and it did so in a way that the potential purchaser was bound to keep that information confidential and deal with it only in respect of the necessary due diligence prior to purchasing the business. Whilst that is a perfectly proper way of going about things in a sale to a third party, at the time of this agreement Mr Golding was not a third party. He was already a director of the business and a shareholder. This disclosure agreement was not signed as a deed and I was unable to identify what consideration flowed between the parties in return for the obligations it required them to perform. It seems to me Mr Golding was already entitled to see everything that Mr Hancock was offering to disclose to him as of right due to his existing position as a director. Similarly, Mr Golding already had a duty to the company to act in good faith and in its best interests which seems to me to meet the duties Mr Hancock was asking him to sign up to. The basis of this confidentiality agreement seems to me to add little, if anything, to the mix.

4.11 Returning to the potential sale of Mr Hancock's shareholding in the Respondent, I find he initially had in mind a value for the business of around £300,000. Mr Golding regarded that as too high although that opinion must have been based more on the limits of the capital he could raise, as opposed to a valuation of the business, as it seems he did no meaningful due diligence on the state of the business finances.

4.12 The only area of due diligence that did seem to occur, and which is central to this case, was to take steps to assess the stability of the key workers. Mr Golding was keen to explore the purchase option. He was in the process of weighing up his options in his own mind and seeking advice from family members with experience of business. One piece of advice offered to him would, I find, cause him to question whether buying a business would put him in any better position than simply setting up on his own. In answering that question, one real issue he had to get to grips with was the view held by the key staff of him potentially purchasing the business. Two members of staff were particularly critical. They were Mr Robinson and Mr Hastings. The business capitalised on its consultant's knowledge of the sector; their contacts and their experience with the client base. Having people with those skills and experience was what made the difference between a successful recruitment business and a failing one. All parties before me recognise that this was a critical issue. Messrs. Robinson and Hastings were employed as senior consultants. They were the Respondent's top billers. Mr Golding had a reasonable basis for thinking each potentially had reasons for not wanting to work under the Claimant, should he take over the business. In Mr Hastings' case, Mr Golding felt he had little respect for him even to the point that Mr Hastings did not much like him. He felt there was a risk this might only intensify and the relationship deteriorate if he took over the business. In Mr Robinson's case, the relationship was quite the

opposite but the dynamic of equal concern. On the one hand they had a very good personal relationship to the extent of it being appropriate to describe them as friends. However, Mr Robinson had his own ambition to set up on his own at some point in the future. The crux of the dilemma faced by Mr Golding was this. If he bought the business, and these two left, he would have no business. He needed to know their views.

4.13 So much is an obvious due diligence issue, and a legitimate one for him to explore. However, it is worth stating the obvious corollary. As devastating as it would be to Mr Golding's plans for these two key employees to leave after he took over, so too would it be equally if not more devastating to the current membership if they ***and*** the Claimant left. The need to contractually bind parties to certain restrictions and obligations in respect of non-solicitation was clearly justified in such a "key worker", knowledge based sector.

4.14 There is a dispute of fact about whether the Claimant raised this due diligence need with Mr Hancock before or after first speaking with these two individuals. I prefer the Claimant's recollection that he raised it before he spoke with them but it is unlikely to be material in the final analysis as I also find Mr Hancock's response to this need to "sound them out" was one of agreement. He understood the Claimant's need to know what their view of things would be for the reasons I have set out.

4.15 From May 2017, Mr Golding began subtly raising his plans with each. He had a number of discussions with each. As I have indicated, the purpose of Mr Golding having these discussions with Mr Hastings and Robinson was to discover their attitude to the Claimant buying the business. That much accords with the consent given by Mr Hancock to disclose the fact of the possibility of the share sale. However, I find the discussions went further than that. There were discussions not only as to their future commitment to the Respondent if Mr Golding bought Mr Hancock's shares, but extending to an alternative the prospect of Mr Golding setting up on his own. I find the conversations with both included an alternative plan to the effect of, instead of buying i4C, if he was to set up on his own would they be interested in joining him in that business.

4.16 I found Mr Golding was inconsistent in his evidence as to whether he accepted the discussions included the fact of setting up on his own and bringing these two colleagues with him or not. Sometimes it was simply denied. Sometimes, it was explained by reference to the context of the discussions and accusing the reporter of twisting what was said to make him look disloyal to the Respondent business. I found his case was couched in a veil which I found was more about explaining his conversations than denying them. The veil was constructed from a concept that he described in terms that "recruitment consultants were all entrepreneurial people and we all have entrepreneurial conversations". He stressed that he did not have a new company at the time of the conversations.

4.17 This went further in the Claimant's pleadings which were drafted when he was legally represented and which he accepted were drafted on his instructions and approval before the claim was presented. It refers to his conversations as doing: -

> ***". . . nothing more than taking reasonable steps and make reasonable considerations regarding the potential purchase of Mr Hancock's shares in the Respondent business and his alternative options if he were not to purchase them"*** *(my emphasis)***.**

4.18 And elsewhere, in denying taking any steps to set up a competing venture in anyway whatsoever, that he was considering his options about: -

> ***"whether to purchase Mr Hancock shares and leave (proceeding to run his other recruitment company RealBee Recruitment Ltd), or whether the Claimant left and set up his own company.*** *(my emphasis again)*

4.19 I found Mr Robinson and Mr Hastings were both consistent in their recollection that the discussions were raised in the context of a clear alternative option. Instead of Mr Golding buying out the shareholding of the Respondent's business, it extended to an enquiry of them each as to whether they would come to work for him in any new venture he set up.

4.20 I found Mr Robinson particularly convincing. He was friendly with Mr Golding and had every reason to support his friend. I found he also avoided conflict if possible and did not want to join a new business in which he would be given an interest as he would not like to feel as though he was being funded by someone else. That is, Mr Golding's finance. I find this reflects the fact that the discussion was not simply to join a new venture, but included the prospects of enhancement in status and terms. At the time, Mr Robinson's principles and loyalty to Mr Golding meant he did not disclose to Mr Hancock what the Claimant had discussed with him as the Claimant was his friend and, if the Claimant left to set up on his own, he was convinced no one else would leave with him. His conclusion was that, in those circumstances, i4C would simply carry on. I find his reaction when Mr Hancock eventually confronted him of what he had learned was, genuinely, that his "heart sank". This emotional response arose in the context of a friend who had been caught out and reinforces what must be obvious in this sector, namely that business can fail when key workers leave to set up in competition on their own. Whilst Mr Robinson had seen no need to disclose Mr Golding's intentions, he equally had no basis to try to cover them up. Once it was out in the open, he would tell the truth as he saw it.

4.21 Both Mr Hastings and Mr Robinson refer to the way discussions were initiated with them. They refer to Mr Golding first raising issues within the Respondent's business. I find Mr Golding did approach each of them with the same style of approach. His discussions would start with a basis from which he and his colleague, Mr Robinson or Mr Hastings as the case would be, could share some common ground about a sense of dissatisfaction with the running i4C. One such issue was the potential for a revised bonus scheme. Once the common ground was established, this would provide a foundation to move on to how things might be in the future. That future would lead on to the discussions about him buying the shares. So much is arguably uncontroversial. Where it moved into the controversial territory is when the conversation then moved on to a view that the cost was not good value for money and that as an alternative, Mr Golding was considering setting up on his own. The key development in the conversation was then to explore with Messrs. Robinson and Hastings the prospect of them joining him in the new venture. A venture which, by definition, would be in competition to i4C.

4.22 I find the fact each was spoken to separately and that the conversation was structured in the same way is corroborative and not, as Mr Golding suggests, undermining of the veracity of their evidence. I did not find it indicative of collusion.

4.23 Around this time, I find Mr Golding also had had a discussion with Caroline Adams which included the possibility of him setting up on his own in the future although I do not find this conversation was anything more than a discussion about long term professional aspirations and in any event, did not involve any suggestions of working together in breach of their obligations to the Respondent. At the time, the two were not on particularly good terms, it perhaps being best described that they had been wary of each other when she joined the business. Their relationship remained extremely strained throughout the Claimant's employment although they have since become much closer, brought together by what would become their common enemy, Mr Hancock.

4.24 I accept that Mr Golding's opinion of the two colleagues was not equal and he understood their view of him was different. Mr Golding submitted that he had little regard for Mr Hastings and would be unlikely to want to involve him in his own company. I find, however, that he recognised they were both essential to the successful continuation of the Respondent's business under his control, and any such venture. That stands in contrast to a genuine respect for Mr Robinson and his professional and personal relationship. Those differences manifest in the fact Mr Robinson was clearly a key target for any future venture. Without him it might not proceed. Without Hastings, it could. That does not mean Mr Hastings was not asked and I find Mr Golding did have the same "sounding out" discussions with him as he did with Mr Robinson, and that he did on at least one occasion go further than the permitted share purchase and into an explicit enquiry as to whether he would leave and come and work for him.

4.25 An issue arose in the evidence as to whether there was a meeting between Messrs. Hancock, Robinson and Hastings about the Claimant's discussions with them. I have concluded there was not. The key reference point in the evidence is Mr Robinson's absence on a week's paternity leave staring week commencing 4 September 2017. I accept his evidence that he was off work at that time and he is unlikely to fail to remember his daughter's birth date of 3 September 2017. The second reference point is the date of the statements from the two colleagues which were written on Friday 8 September 2017. I accept Mr Robinson's evidence that he wrote his whilst off work. I accept he only had a phone call from Mr Hancock about this issue. Although he lived very close to the Respondent's offices and it is right he could have easily attended a meeting, his recollection is that the meeting about this matter happened on his first day back after his leave. I accept that. Conversely, Mr Hastings was under the impression, although not sure, that there was a meeting of all three men before the statements were written and before Mr Robinson went on paternity leave. I find this to be unlikely and his recollection on the timing does not fit with his own account of speaking with Mr Hancock and the whole thing starting off.

4.26 There is, however, a point in time when Mr Hancock learns of the extent of the conversations Mr Golding had been having. The timing was during the Claimant's holiday from 25 August 2017 and until his planned return on either Thursday 7th or Friday 8th

September 2017. The Claimant's partner, Miss Page, was also an employee of the Respondent. They were on holiday together. I find sometime during that period of leave, Mr Hancock was told by Mr Hastings of the extended discussions going beyond the mere purchase of i4C.

4.27 The issue was clearly perceived as a particularly serious one from the outset and I do not accept Mr Hancock delayed in his investigations. I find the time between him first knowing something might be wrong and the statements written on 8 September was no more than a few days. On balance, it puts the start of this issue in the second week of Mr Golding's holiday, more likely than not around 5 or 6 September 2017. I therefore find the phone call between Mr Hancock and Mr Robison to have happened on the day Mr Hancock was told and, during which, the request was made for him to put a statement together, which he did on 8 September 2017.

4.28 I do not accept there was a collective meeting between all three until the following week at the earliest.

4.29 Shortly before the Claimant's holiday, the issue of the valuation of the business had formed the content of discussions between Mr Hancock and Mr Golding. It seems at that time the parties had come to the conclusion to put back any decision until the New Year. I do not accept this was anything more than a question of timing of any possible sale. It did not lead to any sense of annoyance on the part of Mr Hancock which might have formed any motive to see Mr Golding remove from the business. I do accept, however, that this context that the purchase may not go through adds to the concern about the possible alternative plan.

4.30 Before the Claimant returned I find Mr Hancock took some advice. He decided he needed to take serious steps to protect the business, in particular his customer and other contact lists. He therefore blocked the Claimant and Miss Page from access to company emails and IT systems including their company phones. He also discovered the Claimant's notebook on his desk. He viewed it and found it contained notes that he concluded were wholly incriminating and consistent with what he had learned from Messrs. Hastings and Robinson. Mr Hancock would, in due course, not be entirely straight with Mr Golding about how and when this evidence came about. In the meetings following Mr Golding's return from holiday, Mr Hancock led the Claimant to believe he had innocently discovered his notebook and had been concerned enough to ask Mr Hastings and Mr Robinson about it leading to their disclosure. I find that may have been an approach on advice so as not to create a potential issue between the staff in the future if the final outcome was Mr Golding continued in the business, although I also find at this point in time, Mr Hancock's assessment was that the evidence was damming.

4.31 In a later meeting, Mr Hancock again represented to Mr Golding that he had been tipped off by a Mr Bryce, a competitor, who had recently employed one of the Respondent's employees, Stacey Ellis. Her departure had led to some litigation between their businesses. In the course of that conversation, Mr Hancock's suggested Mr Bryce had asked him about his intention to sell his business and was aware that the Claimant was looking to purchase i4C. This was not correct. It was another means of testing the Claimant's account during the

various meetings. As I have already found, I accept Mr Hancock's initial knowledge of the discussions came from Mr Hastings.

4.32 As to the Claimant's notebook, I accept Mr Hancock discovered this for the first time when he was already concerned about what Messrs. Hastings and Robinson said he had discussed with them. On the balance of probabilities, I find it is less likely than more likely to have been a complete coincidence arising from him just happening to be sat at the Claimant's desk. I find there would have been cause for Mr Hancock to have been deliberately searching for evidence and, in the notebook, he found it.

4.33 Two pages contain a clear list of thoughts about buying the Respondent business. Much of it is therefore uncontroversial. Where it begins to become controversial is that it clearly also explores the alternative. Two notes have headings of "setting up on own" which includes the comment "bringing in a colleague" and under a second heading of "setting up on own" the note "considering if colleague joins me". Mr Golding says the note about bringing in a colleague meant simply bringing them on to the board, like Mr Hancock had done with him once he took over the Respondent's business. Between the two interpretations, I find it entirely reasonable that a reader would infer from the language used by Mr Golding that he was weighing his options for the future against the option of buying the business on the one hand, and the clear alternative for him to set up on his own on the other. Not only do I accept that is what Mr Hancock believed the note to mean, I find that is what the Claimant intended in that note.

4.34 Mr Golding and Miss Page flew back to the UK on the evening of Wednesday 6 September 2017. They tried to access their work phones as they had their airline e-tickets stored on them. They could not. They did not know, but they had by then had their access blocked. There was an exchange of text messages. Mr Golding sent a message to Mr Hancock asking if the server had been shut down. Mr Hancock replied saying simply "it is" and asking what time he was back in tomorrow. Mr Golding replied that he is not back in until Friday. Mr Hancock thought it was tomorrow (Thursday). Mr Golding explained they were heading to family to spend a day with them. Mr Golding explained his understanding of their holiday entitlement and said, in any event, he planned to work remotely on Thursday. Mr Hancock replied: -

> ***"Ah right, it is actually down as tomorrow Pm which used all your holiday up. I have booked a meeting with Jon DeVita at 1.00pm at his office and I need you and preferably Emily there. I have had a development with the Stacey stuff that won't wait.***

4.35 There was in fact no development with the Stacey stuff. It was a ruse for getting Mr Golding and Miss Page to the meeting at which he wanted to speak with them both about the matter informally, but away from the workplace. Jon DeVita was Mr Hancock's lawyer. Mr Golding knew that to be the case. Despite the "Stacey stuff" providing an apparently legitimate reason for such a meeting taking place with Mr DeVita, Mr Golding sensed something was wrong. I suspect this arose from two things. One was why it was that Miss Page was also invited to the meeting. The second was his sense that his plans and discussions with his colleagues were now known to Mr Hancock. I reach that finding because of what then happened on 6 September. Instead of the planned visits to family on Thursday 7

September, the two drove straight back Lincoln that night and directly to the Respondent's premises, arriving around midnight. They were denied access to the building because, just as they had been excluded from the IT systems, the locks to the building had also been changed. The purpose of the visit at that late hour was principally for Mr Golding to collect his diary and notebook. The same notebook Mr Hancock had by then already discovered. I found this urgency most curious and I did not hear any explanation that appeared to justify the urgency to obtain those items at such a late hour, as opposed to simply collecting them the next morning in advance of the meeting scheduled for 1pm. Something caused Mr Golding to attend at that time, a time he would be unlikely to come into contact with any of his colleagues.

4.36 The meeting itself took place on 7 September. About an hour before the time of the meeting, the Claimant attended at work. There was nothing stopping him and having discovered the locks had been changed, he was now even more suspicious. Mr Hancock asked him to go straight to the solicitors. He refused and wanted to enter the building. There was a heated argument in the car park before Mr Hancock, Miss Adams and the Claimant and Miss Page went to a meeting room. The meeting that appears to have been planned to take place at the solicitor's office instead took place here. Miss Adams remained in attendance. At that time, if not now, she shared the concern about the business being undermined by the potential loss of three of its key employees. The meeting was recorded secretly by the Claimant. The notes prepared by Mrs Adams and or Mr Hancock are brief and in summary. The meeting was strained and heated and little progress was made because of that.

4.37 The first allegation put to the Claimant was that he had breached the confidentiality agreement by the fact that a Mr Bryce, a competitor of the Respondent, had said to Mr Hancock that he knew he was looking to sell his business. Mr Golding said it could have come from Mr Robinson and Mr Hastings who knew his plans. It seems this introduction was the ruse to explain how Mr Hancock came to be in possession of the Claimant's notebook, the two significant pages of which was then put to the Claimant in terms of a plan of action to set up a new business and bring existing colleagues in with him. He put it to the Claimant that he was not able to raise the money to buy the business and had had these conversations with Mr Hastings and Mr Robinson on the basis of "if he couldn't raise the money would they come with him and set up"

4.38 The Claimant denied speaking to the two colleagues in the context in which it was alleged although he did talk to them about the potential sale of the business. He said at one point in the meeting that: -

> ***"he might have sat back and thought to myself, okay, what sort of options are there for me here long term. I wanted some questions answering because I was potentially wanting to know what the outcomes would be but it doesn't mean I was going to leave you Lee."***

4.39 He described his conversations as testing their loyalty as he did not believe they would stick around if he bought the business.

4.40 Mr Golding accepted that he had discussed the advice he had received from his father with Mr Hancock on a number of occasions which was, in terms, rather than purchase an established business to set one up from scratch.

4.41 In denying the allegations, he suggested it would not be something he would have done at a time when Miss Page had found out she was pregnant and what they both needed was stability in work.

4.42 Tempers were running high on both sides. Mrs Adams confirmed that the Claimant had had a similar conversation with her in which they discussed two options, you either buy the business if you want something long term and you want some ownership or you set up on your own. Mr Golding stressed that did not mean he was going to do it. Mr Hancock referred to the permission he had given him to test the view of Mr Robinson and Mr Hastings if the Claimant bought the business and the limits of that. Mr Golding accepted that he potentially tested the water a little further with Mr Robinson but only to check the commitment.

4.43 The plan to hold a formal meeting at which the Claimant could have representation was indicated. The Claimant and Miss Page were suspended as was another member of staff who was a distant relative of the Claimant although I have no further evidence as to the circumstances of that. As the meeting closed, the plan was to reconvene the following day for a formal meeting.

4.44 The written witness statements previously referred to were obtained from Messrs. Robinson and Hastings dated 8 September. Both were short. The authenticity was challenged by the Claimant but the final version of the statements contained in the disciplinary pack were confirmed by each witness as their evidence. In Mr Robinson's statement he described: -

> ***In recent months Christian has made it clear that he had to make a decision at the turn of the year. He had frustrations with the business but none so severe to make him walk away, it was more to do with his desire to building his own business and do something for himself. He felt he had two options, purchase i4C or set up a new business and go it alone.***
>
> ***In June he asked me my opinion and if I would be happy if he owned i4C with full control over the business he also asked that if he decided to leave and set up a new business would I follow him. He said he would go alone but would find it a lonely existence. In July in a separate approach he shared with me the positives to this option and said I would be better off financially and would have equal shares in the business, without putting any money in.***

4.45 Mr Hastings similarly described Mr Golding discussing the purchase of i4C and went on to say: -

> ***Each time these conversations were extended where I was also asked to consider stepping away from i4C to form a partnership with both Christian and Matthew. The prospect of earning more money and having greater controlling driving a new venture were the two advantages put to me. These conversations happened this year in the months of July and August although less direct but similar sceneries [sic] had been loosely suggested prior to this but have not been taken seriously.***

4.46 I assume he meant scenarios and not sceneries.

4.47 The meeting didn't take place the next day. Mr Golding emailed Mr Hancock seeking clarity of what was happening and the purpose of the meeting. An undated letter was sent to the Claimant inviting him to a disciplinary hearing to be held on 11 September 2017. The misconduct alleged was "you saw to entice away existing employees of the company to join you in a new venture business". It was alleged to be gross misconduct for which the potential outcome could be dismissal without notice. It reminded Mr Golding of his right to bring a colleague or trade union representative to the hearing. The evidence to be relied on was enclosed including the statements from Messrs. Robinson and Hastings.

4.48 Mr Golding refused to attend the scheduled meeting. The parties exchanged emails concerning this and his desire to be legally represented. This was refused but new dates for hearing offered to allow Mr Golding time to consult with his legal representative.

4.49 The disciplinary hearing was held on 15 September 2017. In attendance were the Claimant with Miss Page, Mr Hancock and Mr Dawson taking the minutes. The meeting was chaired by Jon DeVita. Once again, the Respondent produced notes of the meeting but it was also being covertly recorded by the Claimant and a transcript of that has been produced.

4.50 In summary, the two positions established by Mr Davita were, from the Respondent's perspective it looked like a coup, from the Claimant's perspective, the conversations had been taken out of context. In one passage Mr Golding explained how he did not always initiate the conversations and in the past, Robinson had approached him and initiated conversations about potentially breaking away from the business in the future. The meeting was adjourned.

4.51 A further invitation was sent to the Claimant on 30 September 2017 inviting the Claimant to a reconvened hearing on 4 October 2017. The allegations were now set out rather more fully. They were: –

> ***"Taking part in activities which caused the company to lose faith in your integrity namely, alleged unauthorised disclosure of confidential company information to a third party in breach of the confidentiality agreement between us dated second of May 2017. ... in breach of your employment contract with us and the confidentiality agreement, it is alleged that you were preparing to set up a business in direct competition. Furthermore, you approached 2 employees about the business venture trying to poach them from the company. These accusations, if proven against are a breach of your implied duty of fidelity with us and in breach of your contractual obligations.***

4.52 Further correspondence followed. The Claimant sought particulars of the additional charge relating to breach of confidentiality. Mr Hancock confirmed this was a reference to the fact that Mr Golding had discussed "with other members of staff" the fact that Mr Hancock was considering selling the business. If that was meant to include employees other than Messrs. Robinson and Hastings, it did not make that clear. The Claimant ultimately declined to participate in any further meetings and simply invited Mr Hancock to reach his conclusions. Mr Golding concluded his email saying that he had nothing further to say and Mr Hancock already had his responses.

4.53 By letter dated 13 October 2017 the Claimant was invited to an investigation meeting to consider a further allegation that the Claimant had contacted an existing customer in contravention of the terms of his suspension. No further particulars were provided in the letter. The hearing was scheduled to take place on Tuesday 17 October. The Claimant was warned that if he did not attend the investigation meeting while suspended on full pay, the company would treat it as a separate issue of misconduct. Upon receipt of the letter, the Claimant immediately responded by email denying the allegation. He stated that he would not be attending the proposed meeting. He requested, for the third time, that Mr Hancock make a decision on the original disciplinary allegations.

4.54 Week later, by letter dated 25 October 2017, Mr Hancock's decision to summarily dismiss the Claimant was sent to the Claimant. The reason stated was: –

> ***The reason for your dismissal is that you have conducted yourself in a way which was in fundamental breach of contractual terms which irrevocably destroyed trust and confidence necessary to continue the employment relationship. You acted in breach of your employment contract with us, in breach of the shareholders agreement between us and in breach of the confidentiality agreement dated 2 May 17 in that you sought to entice away from our employment existing employees of this company to join you in a new business venture.***
>
> ***…***
>
> ***You discussed the purchase of the business with members of staff in contravention of the confidentiality agreement discussed above.***

4.55 The letter also refers to the allegation that the Claimant had contacted customers in breach of the terms of his suspension. No determination was made on the matter because the investigation hearing did not take place. That may be just as well, as the way in which the allegation was by then framed, it had increased to contacting multiple clients on multiple occasions and, rather curiously, was said now to be in breach of the post-termination restrictions of the Claimant's contract of employment. How an employee can be in breach of a post termination obligation prior to the employment terminating was not explained.

4.56 Mr Golding was given a right of appeal against the decision. He chose not to appeal the decision. He accepted there was no prospect of a return to the Respondent after what had occurred and the delay in reaching the decision.

4.57 Subsequently, both Mr Golding and Mr Robinson have set up their own separate businesses in broadly similar fields of activity. Mr Golding is critical of the Respondent for not taking action in respect of Mr Robinson, as it had with him. I find Mr Robinson's business, SFR Limited, was incorporated shortly before he left the Respondent. He was not a director of the Respondent. I accept that his business was in a similar sector and close to the Respondent's area of expertise, but not in competition with it. I also accept that where their clients did overlap at the margins, they had a reciprocal referral between businesses, although in view of what happened to the Respondent, I suspect this reciprocal arrangement actually arose with the continuation of RealBee Recruitment Limited, rather than the Respondent. The reason is that the Respondent declared insolvency and ceased to trade about a month after Mr Robinson's resignation. That fact provides one of a range of possible

answers as to why there was no attempt to enforce any post termination restrictive covenant. At one level, even if Mr Robinson's new business was such as to engage his restrictive covenants under his contract of employment, it is arguable there was then no longer any business interest to protect. That might have been different if the Respondent had entered administration, but it did not, it entered creditors voluntary liquidation. I also find Mr Hancock was not aware of SFR until Mr Robinson's resignation. Finally, I find Mr Robinson did not, nor was he believed to have, attempted to entice away any of the staff of the Respondent. In any event, Mr Hancock explained one reason for the lack of action on the practical basis that the insolvency meant he had other things to worry about.

5. BREACH OF CONTRACT

Law

5.1 I start by directing myself on the relevant law which is well settled.

5.2 The Respondent must satisfy me, on the civil standard of proof, of facts which show that the Claimant had acted in a manner which is sufficient to repudiate the contract. Unlike the claim of unfair dismissal, my focus is on the primary facts alleged, not on whether the employer acted reasonably in reaching the conclusion it did.

5.3 The test of what is colloquially terms gross misconduct and as to whether the Claimant has acted in such a way was laid down in **Neary v Dean of Westminster [1999] IRLR 288 ECL (Special Commissioner)** subsequently approved by the court of appeal in **Briscoe v Lubrizol ltd IRLR 607**. That is that the employee's conduct: -

> ***"must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment"***

5.4 It is a test that requires me to have regard to all the relevant factors in the particular case and is fact specific.

Discussion and Conclusions

5.5 I start by considering the contractual and other legal obligations the Claimant was under and, remind myself that I am concerned with the Claimant's contractual relationship between him and the Respondent in his capacity as an employee. The written contract of employment does not contain any express non-solicitation/enticing away clause. To be in breach of his contract of employment therefore, the circumstances of the case must offend an implied term, such as the implied duty of fidelity. Other terms may be necessarily implied from other obligations which are imported into the expected standard of conduct and standard of performance of his other obligations under the contract.

5.6 Additionally, two further points arise from the wider contractual relations between Claimant, company and its members. First, the fact of his appointment as a statutory director did change the nature of his legal obligations towards the company even though his existing written contract of employment remained unaltered. Whatever the standard of his obligations

as a mere employee, they were then elevated to standards of a fiduciary nature. Secondly, when the Claimant became a shareholder, he signed up to a contract which, at clause 7.3, explicitly obliged him not to seek to entice away from the Respondent any of employees. The clause describes a spectrum of acts. At one extreme is an immediate offer of employment. At the other extreme there is a breach when there is merely an attempt to seek to entice away from the company an employee of the company.

5.7 That particular contractual obligation arises in his capacity as a shareholder and not as an employee or director. However, it is so inextricably linked to the other duties and obligations of the Claimant as an employee that, in the context of a shareholder who was also an employee and director, it is inconceivable that a breach of clause 7.3 would not at the same time both irrevocably destroy the necessary trust and confidence in the employee and also place that director in breach of his fiduciary duties to the company. Of the various fiduciary duties imposed on a statutory director of a company, both at common law and part 10 of the Companies Act 2006, the most important in the context of this case are the primacy of promoting the Company's success and avoiding conflicts between his role and his personal interests.

5.8 I turn then to whether what I have found as a fact occurred amounts to a breach of clause 7.3 and/or otherwise is conduct meeting the ***Neary*** test.

5.9 Although the Claimant at times appeared to deny the comments were ever said, at other times his position was more about the context of the comments. I have found the conversations did take place. The potential breach however, is not so much the comments per se, but the reality of what they convey being put into effect. It seems to me the summary of the competing cases made by Mr DeVita is apt. It is either that the Claimant was discussing with his two colleagues the real possibility of them joining him in a new start-up, or the comments have been taken out of context.

5.10 The points in the evidence before me which support the interpretation that this was a discussion to set up on his own are these. First, the Claimant did have a known desire to run his own business. Second, he had been advised in a way which questioned the value of the purchase compared to a start-up. Third, these two options were clearly options he was weighing and were expressed in his notebook. Fourth, the reason the discussions with Mr Hancock stalled was because of the Claimant's concern about the value of the business and/or his ability to raise that amount of money. Fifth, the alternative option of setting up on his own formed part of his pleaded case. Sixth, the fact that the Claimant's evidence varied, sometimes to the effect that he did say something along the lines of that alleged but that it has been taken out of context.

5.11 The points in the evidence which support the Claimant's interpretation that his comments were simply taken out of context are these. First, that he had obtained permission to talk to Messrs. Robinson and Hastings in the context of their future intentions if the Claimant purchased the Respondent business. Second, that this was a test of their commitment to the which Claimant which could be tested in a discussion about working together in a future venture. Third, that Mr Golding had not at that time, although he did soon

after his dismissal, set up a company which could have employed either person if their response to him had been positive. Fourth, that Miss Page was pregnant and that they would not create uncertainty when they needed stability for the time being.

5.12 In approaching this question, I do not find there is any breach or misconduct in the Claimant obtaining private advice about setting up on his own in the future, still less holding a desire to do so at some future date. The restrictions and obligations placed on him by virtue of his contract and office do not bind him for eternity never to set up on his own even if in competition with the Respondent. It only becomes an issue when that future desire or intention brings him into conflict with his current obligations to the Respondent. As I have said, there has to be something about the words used which evinces a reality about them being carried through or part of the process of setting up a competing business. The planning for a start-up has to begin somewhere and a breach, or the necessary misconduct, could occur in the very early stages of that planning. Consequently, I do not regard a statement made outside this context or made as a mere puff or simply as empty words would be enough. Conversely, when made in a context where what is said between the parties could inform the further planning of a start-up, even at some future date, that would be sufficient to place it within the context of the early stages of planning that start-up.

5.13 As to the confidentiality agreement, this was signed in the context of a potential share sale and clearly did require Mr Golding not to disclose the fact of the potential sale to third parties. However, I have already referred to the fact that this agreement was not signed as a deed and that I was unable to identify any consideration flowing between the parties. Both appearing to sign up to obligations they were each already under. In any event, it is clear that the mere fact of talking to Mr Robinson and Mr Hastings about their loyalty to him on buying the Respondent business cannot be the basis of a breach. All parties accept it was a reasonable step to take. Mr Hancock accepts permission was given for this to happen to take place and I found this happened before the discussions. Its relevance is, therefore, only that it provides the context for the two competing positions now before me. Either the possibility the discussions went further or providing a context for ambiguity or misinterpretation about what was actually being said within the scope of the permission obtained.

5.14 The real focus of this case, therefore, is whether the Claimant did in fact overstep the boundaries of his legitimate enquiries with these two key members of staff and step into an area that would put him in breach of contract. I have concluded that if the only evidence was the words spoken in isolation, I could not conclude that there had been a breach of contract or conduct entitling a dismissal without notice. That is particularly so in the context of why permission was given for Mr Golding to speak to Messrs. Hastings and Robinson. But the evidence is not limited to the words spoken. They occur in the context of an industry where breakaway start-ups are a reality and can seriously damage, if not destroy, the business that they leave behind. They occur against a background of clear evidence that Mr Golding was being advised about his alternative options to create a start-up as an alternative to purchasing this business. There is clear evidence of Mr Golding weighing those options. In that regard, and perhaps based on other discussions that the two had had about the future, Mr Robinson was particularly convincing in evidence that he understood the purpose and intention of the

discussion with the Claimant to be something quite different to the option of buying the Respondent business. It was instead of. He gave his evidence from a position of someone who, at the time at least, did not want to do harm to the Claimant.

5.15 Therefore, the fact that there was a real and live alternative option of the start-up causes me to ask the question, what would have happened if either or both Mr Hastings and Mr Robinson had given a positive response. In those circumstances, particularly if Mr Robinson was on board, the conclusion I have reached is that this would have marked the next phase of planning the breakaway start-up. It was more than a ruse for testing loyalty. I have concluded that is sufficient to place Mr Golding's discussions in breach of clause 7.3 of the shareholder agreement and, more pertinently, his wider duties under his contract of employment.

5.16 I am satisfied that the discussions with Mr Hastings and particularly Mr Robinson were therefore with a view to enticing them away from the company. They were premised on problems within the Respondent's business and included prospects of advancement. Had the conversations resulted in positive responses, I am satisfied that the plans would have progressed to establish the competing business. Whether that occurred quickly or over a longer gestation, a time would have come when Mr Golding would have had to resign from the Respondent in respect of both his employment and directorship. His shareholding would then have fallen to be determined according to the agreement, most likely by then being deemed a bad leaver by the majority and being forced to sell it to the majority. Whenever that occurred, the new venture would have commenced very soon afterwards and in any event well within the 12 months' backstop provided by clause 7.3(b) of the agreement. A question then arises as to whether the offer, or the attempt to entice, has to be capable of performance within the necessary temporal restriction. Mr Golding says he did not have any such company or business at the time to which he or anyone else could have been employed. In my judgment, that is not material. Clearly, the existence of a business entity is a relevant piece of evidence and in certain circumstances could itself place the Claimant in breach of his fiduciary and other duties. That there was not yet such a company simply means the alleged breach and conduct needs to be considered more cautiously. It also means the effect of the breach and potential loss to the Respondent, may not have happened immediately. Those factors, though relevant, are not determinative and I do not interpret clause 7.3 as requiring immediacy of consequences, nor his other duties. There is nothing to prevent the offer, or attempt to entice away, to take place within the prohibited time even if the practical consequences happen at a later date. Indeed, the fact that an attempt to entice is itself a breach clearly means there is a breach even when the existing employee declines the approach. I am satisfied those considerations are evidential mattes and having made my findings, do not prevent the Claimant's actions from amounting to a breach of clause 7.3, the implied term as to fidelity, the incorporated fiduciary duties of a director and in any event meeting the ***Neary*** test.

5.17 It follows that the termination without notice was not in breach of contract because, as a matter of common law, it amounted to the Respondent accepting a prior repudiatory breach by the Claimant. Alternatively, in this case there was a relevant term of the contract of

employment at clause 12.4 entitling termination without notice such that, in strict contract law orthodoxy, the contract of employment was ended without notice by performance of that clause. The practical effect is the same either way.

6. UNFAIR DISMISSAL

The Law

6.1 Again, I start with directing myself on the relevant law which is also well settled.

6.2 Section 98 of the Act provides:

> ***(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a)the reason (or, if more than one, the principal reason) for the dismissal, and***
>
> ***(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2)A reason falls within this subsection if it—***
>
> ***(a) …***
>
> ***(b)relates to the conduct of the employee,***
>
> ***(3)..***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case."***

6.3 The true reason for dismissal is a question of fact for me to determine on the evidence. The reason required by s.98(1) is simply the set of facts or beliefs operating on the mind of the employer at the time it takes the decision, and causing him, to dismiss. (**Abernethy –v- Mott Hay and Anderson [1974] ICR 323**). That reason must itself fall into one of the categories of potentially fair reasons defined in s.98(1). The legal burden rests with the Respondent to establish the reason that it dismissed the Claimant.

6.4 In **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439 (Browne-Wilkinson J (P)) the correct approach to adopt in answering the question posed by section 98(4) is as follows:

> **"(1) the starting point should always be the words of section 57(3) themselves:**
>
> **(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;**

> **(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;**
>
> **(4) in many (though not all) cases there is a 'band of reasonable responses' to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;**
>
> **(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is far; if the dismissal falls outside the band it is unfair."**

6.5 In **Post Office v Foley** [2000] IRLR 827 Mummery LJ at paragraph 53 commenting on the approach set out in **Iceland Foods** for the ET to adopt, observed:

> **"…that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to 'reasonably or unreasonably' and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not."**

6.6 The hypothetical reasonable employer must be engaged in the same field as the employer (see **Siraj-Eldin v Campbell**, **Middleton Burness and Dickson** [1989] IRLR 208.

6.7 The approach to be adopted by an ET where an employee is dismissed on the ground that the employer had entertained a suspicion or belief of misconduct by the employee was explained by the EAT in **British Home Stores Ltd v Burchell** [1978] IRLR 314:

> **"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."**

6.8 The extent of investigation necessary to be regarded as reasonable will depend on the facts of the case, the extent to which the allegations are disputed and their gravity and consequences. (**ILEA v Gravett [1988] IRLR 497**, **A v B [2003] IRLR 405**)

6.9 In **Sainsbury's Supermarkets Ltd v Mr P J Hitt [2002] EWCA Civ 1588** Mummery LJ made clear that it is necessary to apply the objective standards of the reasonable employer to all aspects of the question whether the employee had been fairly and reasonably dismissed (para 29). At paragraph 30 he stated:

> **"… the range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) apply as much to the question of whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."**

6.10 Turning to the question of disparity of treatment as a species of unfairness, the seminal exposition of the relevance of disparity comes from **Hadjioannou v Coral Casinos [1981] IRLR 352**. There it was stated how disparity may be relevant in 3 situations. The first is where it may suggest the true reason for dismissal is different to that advanced. The second is where the employer has previously condoned a disciplinary act so as to lead the employee to believe he will not be dealt with as harshly as he subsequently was. The third is where two employees are treated differently in respect of the same matter. All but the first are said to be engaged in this case. The requirement for the comparator cases to be truly parallel was restated in **Paul v East Surrey DHA [1995] IRLR305 CA,** in which employment tribunals were encouraged to scrutinise disparity cases with particular care. The case of **Securicor v Smith [1989] IRLR 356 CA** provides authority for my starting point, namely that the question for the tribunal remains whether the Respondent's decision fell within band of reasonableness or not.

Discussion and Conclusions

6.11 The first question to determine is what facts or beliefs were operating on Mr Hancock's mind when he decided to dismiss the Claimant. The letter of dismissal conveys the answer and, as I have found, there were two reasons in his contemplation. The first was the belief that Mr Golding had attempted to entice away Mr Robinson and Mr Hastings in breach of various obligations to the Respondent. The second was a breach of the confidentiality agreement in discussing with employees the fact of the potential share sale. Both of those reasons fall within the potentially fair reason of conduct.

6.12 The fact there are two reasons means the Respondent has to satisfy me of the principal reason. The first to arise in time was the belief that the Claimant was attempting to entice away two colleagues for a future new start-up venture. That remained the main focus of the issue throughout. The second, the breach of confidential information issue, was added later but I am satisfied it remained a secondary issue both in terms of the order in which the two matters were dealt with and expressed in correspondence. In my judgment, the sense of gravity of the former over the latter operating on Mr Hancock's mind was sufficient for the former to be the principal of the two reasons.

6.13 I have considered the question of which is the principal reason with particular care as the prospects at the next stage between the two reasons differ significantly. As to the principal reason as I have determined, I am satisfied that the attempt to entice colleagues away was a belief which was genuinely held. There is nothing in the evidence to suggest the previously excellent working relationship that Mr Hancock and Mr Golding had enjoyed would otherwise have changed but for this belief and there is nothing else that could explain why Mr Hancock might suddenly want to remove Mr Golding from the business. In fact, the process and consequences of removing Mr Golding were detrimental to the business. The only

explanation for what happened was that it was a genuine belief. I will consider the remaining tests of reasonable belief following a reasonable investigation below. However, as to the secondary reason, there is no basis for Mr Hancock holding a reasonable belief that the Claimant was guilty of a disclosure of confidential information in disclosing the potential share sale. In so far as that is said to relate to the Claimant speaking with Messrs. Robinson or Hastings (the actual alleged recipient/s were never identified), he gave permission for this to happen and cannot therefore have held a reasonable belief that it was done in breach of any obligations to him or the Respondent. In so far as it is said to relate to any other employee, there was simply no evidence before Mr Hancock to establish that the Claimant had disclosed the fact beyond those he had permission to. There was no evidence of any investigation beyond an assumption that if Bryce was aware of selling up, the Claimant must have been involved in the disclosure. That would not have been sufficient to establish a reasonable basis on which the belief could be said to have been reasonably held. If this had been the principal reason for dismissal, it would not have survived s.98(4). However, I have concluded it was not. Having established the principal reason, being satisfied that was genuinely held and that it falls within one of the potentially fair reasons, I must now consider whether the Respondent acted reasonably or unreasonably in treating that as a sufficient reason for dismissal within s.98(4).

6.14 I start with the procedure adopted. The procedure starts with the request to attend the meeting at the Respondent's solicitor's offices on Thursday 7 September. For the reasons found above, that did not happen and the meeting took place at a meeting room where the Respondent was based. It was fraught and there are aspects of it that lead me to conclude Mr Hancock went into that meeting with a view that this would potentially be the disciplinary hearing. There was no prior warning to the Claimant of the issues. However, an investigative or disciplinary process has to start somewhere. In this case it was this face to face confrontation. It could have been done differently. It could have been done by setting out the concerns in writing and given the Claimant opportunity to attend having prepared his case. It this case there were business assets potentially in need of protecting. The question is whether what did happen met the relevant test. This was a small employer and the risks were reasonably seen as high to the employer so as not to tip-off the Claimant about what had been discovered. It cannot be said that the decision to confront the issue in this way fell outside the range of reasonable responses. Thereafter, the process was conducted in accordance with the Respondent's policy and the ACAS code on Discipline and Grievances. The Claimant was invited to further hearings by letter setting out the allegation, enclosing the evidence to be relied on, given a right to be accompanied and with time to consider his response. The outcome of the meetings was communicated to the Claimant. The Claimant chose not to engage in the final hearings and chose not to appeal but had the right to do both. I was concerned about the additional allegation of contacting customers and the absence of particulars or evidence being given to the Claimant but was satisfied that this was not considered further on its merits, and therefore it does not have any material bearing on the procedural fairness. It was not, for example, something which altered the way the Claimant engaged with the issues of substance. I am therefore satisfied that the Respondent adopted a procedure which fell within the range of reasonable responses of a reasonable employer in those circumstances.

6.15 I then turn to whether the Respondent's investigation of its concerns was reasonable. There were three key people that Mr Hancock had to speak to in order to explore the issue of enticing staff away. They were Mr Hancock, who raised the issue with him; Mr Robinson, who was named as also having been spoken to, and the Claimant himself. That was done. In addition, Mr Hancock had discovered the notebook which was also put to the Claimant. In the context of this case, although that is an investigation with confined scope, I cannot say the investigation conducted fell outside the range of reasonable responses.

6.16 In any event, the case was never really argued on the basis of an inadequate investigation. The real issue was, having had both sides of the case before him, whether Mr Hancock could reasonably have rejected the Claimant's account that the comments were taken out of context and, instead, hold the belief that he did. I have considered this point carefully. Mr Hancock was certainly persuaded by the information given to him by Messrs. Hastings and Robinson. If that were all he had, he may have been open to accusation that he approached the first meeting with a closed mind and the discussions within it were certainly tense and angry. But he did have more. He had the notebook which any reasonable employer would have been entitled to say demanded an explanation. He also had the background to the discussions over the share sale and it appearing to stall or be deferred. Those matters reasonably provided a sense of corroboration for the likelihood that what Messrs Hastings and Robinson were saying was correct. Significantly, however irate the first meeting became at times, there was opportunity to reflect before any disciplinary hearing itself was held and the competing explanations of the Claimant in response could be properly weighed. For reasons that largely mirror those given above in respect of the claim of breach of contract, I am satisfied that Mr Hancock was entitled, within the context of the test set out in s.98(4), to reach the belief that the discussions had occurred as Messrs Robinson and Hastings described and that the prospects of that start-up happening were sufficiently real to be more than empty chatter. The belief was therefore reasonably held.

6.17 That meant the employer was entitled to find the Claimant was guilty of misconduct which was in breach of his various obligations to it. The final consideration is whether the sanction of summary dismissal fell within or outside the range of reasonable responses. I am satisfied it was within it. That is particularly so from the context that the only reason permission was given to Mr Golding to speak with Messrs Robinson and Hastings about the possible share transfer was because the significance of potentially not having them in this small business was the effectively the difference between a successful or failing business. That concern applied to Mr Hancock as well.

6.18 At one level, that dismissal was a reasonable response must follow from my own conclusion that the circumstances of what took place amounted to conduct entitling the employer to dismiss summarily but, viewed through the prism of unfair dismissal, that is not necessarily the only consideration. There may be circumstances in any one case for which summary dismissal would not be within the range or reasonable responses even though it warranted it at common law. One such situation is where an employer had responded to the conduct with lesser sanctions in truly similar cases. It is in this respect that the Claimant pointed to the Respondent's response to Mr Robinson's resignation and him setting up SFR

Limited in the following June. I do not accept his situation is truly parallel to that of Mr Golding. In particular, there was no suggestion Mr Robinson had attempted to entice away existing staff. Nor was Mr Robinson's duty to the business to be viewed at the standard of a director of the Respondent. I am also not satisfied the comparison falls within any of the three situations envisaged in **Hadjiouanou**. The circumstances of the timing of the two cases in the Respondent business does not cause me to question the genuineness of Mr Hancock's belief in the true reason for dismissal. Secondly, the two were not dealt with differently by the employer for the same matter. Thirdly, the order of the two cases being as it was does not allow Mr Golding to rely on the employer's past treatment of Mr Robinson's actions as a basis for thinking his employer would respond to his misconduct with a lesser sanction. They are the wrong way around.

6.19 Consequently, I am satisfied that dismissal was reasonably open to the employer in these circumstances as it fell within the range of reasonable responses of a reasonable employer.

EMPLOYMENT JUDGE R Clark

DATE 23 February 2020

JUDGMENT SENT TO THE PARTIES ON

……...…….

.

AND ENTERED IN THE REGISTER

……...…….

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FOR SECRETARY OF THE TRIBUNALS